89-241

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

———

DANIEL P. HULSEY,

Petitioner,

v.

USAIR, INC.,

Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

———

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QUESTIONS PRESENTED

1. Whether it is proper for a court of appeals to affirm a summary judgment on the basis that there is no genuine issue of material fact where plaintiff was stayed from seeking any discovery.

2. Whether it is proper for a court of appeals to affirm a summary judgment on the basis that there is no genuine issue of material fact when the basis of the district court's summary judgment was on an issue which did not involve resolving disputed issues of material facts, and during which time plaintiff was stayed from seeking any discovery.

3. What is the appropriate proof scheme in a claim brought by a protected employee under the Airline Deregulation Act of 1978.

4. Whether the merits of a claim that an employee was terminated because of his status as a forced hire employee under the Airline Deregulation Act of 1978 should be heard by a federal court or by a system board of adjustment established pursuant to the Railway Labor Act.

LIST OF ALL PARTIES TO THE PROCEEDING REQUIRED BY SUPREME COURT RULE 21.1(b)

Parties to the proceeding are as follows:

1. Daniel P. Hulsey.
2. USAir, Inc
3. Hal K. Gillespie, Esq., Hicks, Gillespie, James, Rozen & Preston, P.C., One Mockingbird Plaza, Suite 760, Lock Box 127, 1420 West Mockingbird Lane, Post Office Box 560388, Dallas, Texas 75356-0388.
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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

DANIEL P. HULSEY,

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USAIR, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Daniel P. Hulsey (hereinafter "Hulsey"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above referenced matter on April 3, 1989 (Petition for Rehearing denied on May 12, 1989).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals at bar is reported at 868 F.2d 1423 (5th Cir. 1989). The opinion is reproduced in the Appendix hereto (App. A, at 1a).[1]

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[1] The Appendix hereto is presented in an appended volume designated as "App." The Trial Court's Judgment and Order, dated October 20, 1987, are reproduced in the Appendix (App. C and App. D).

JURISDICTION

Hulsey's Petition seeks review of the Judgment of the Court of Appeals entered on April 3, 1989. By Order dated May 12, 1989, the Fifth Circuit denied Hulsey's Petition for Rehearing. (App. D.) This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

STATUTES AND REGULATIONS

Statutes—The Appendix contains the following: The Airline Deregulation Act of 1978, § 43(d), 49 U.S.C. App., § 1552 (1987).

STATEMENT OF THE CASE

A. Nature of the Case

Hulsey brought suit in the United States District Court for the Northern District of Texas, Dallas Division, alleging the unlawful circumvention of the first right of hire provision of the Employee Protection Program in 49 U.S.C., § 1552, by USAIR, Inc.'s (hereinafter "USAIR") termination of Hulsey without justification. Hulsey further sought to have his job status reinstated, as well as reinstatement of benefits lost and protection against retaliation. The jurisdiction of the District Court was invoked under 28 U.S.C., §§ 1331, 2201, and 2202.

B. Proceedings Below

Hulsey filed his original complaint against USAIR on November 17, 1983 (Tr. 1).[2] Pursuant to an Agreed Order of October 15, 1984, proceedings were stayed pending a final decision in the matter that was ultimately resolved by the United States Supreme Court in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 94 L.Ed.2d 661 (1987) (Tr. 27). The court lifted its stay and ordered various deadlines by its Order of May 1, 1987 (Tr. 98).

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[2] References to the record will be cited as "Tr." with appropriate pagination.

By pleading of July 31, 1987, USAIR filed its Motion to Dismiss and Motion for Summary Judgment (Tr. 105). Hulsey responded on August 31, 1987 (Tr. 140, 179); and USAIR replied on September 18, 1987 (Tr. 195). By Memorandum Opinion and Order, dated October 20, 1987, United States District Judge Barefoot Sanders, Acting Chief Judge of the Northern District of Texas, granted USAIR's Motion for Summary Judgment (Tr. 265), and entered judgment accordingly (Tr. 272). Hulsey filed his timely Notice of Appeal on November 19, 1987 (Tr. 273).

Oral argument was conducted on Hulsey's appeal on June 9, 1988 before Judges Goldberg, Garwood, and Jolly. Under the opinion of Judge Garwood of April 3, 1989, the Panel affirmed. (App. A.) Hulsey then filed Petitions for Panel Rehearing and Suggestion of Rehearing En Banc. On May 12, 1989, the Fifth Circuit denied Hulsey's Petitions for Panel Rehearing and Suggestion of Rehearing En Banc. (App. B.)

C. Statement of Facts

As found by the district court, two key facts are undisputed: (1) Hulsey is a protected employee under the Airline Deregulation Act of 1978, Section 43(d), 49 U.S.C. § 1552 (1987) (hereinafter "the Act"); and (2) USAIR is subject to the Act (Tr. 267). More specifically, Hulsey was a pilot on non-probationary status with Braniff Airways, Inc. from 1973 until Braniff ceased operations and filed bankruptcy in 1982. (Tr. 2-3, 141, ¶ 3, 266). On or about June 1, 1982, Hulsey applied to USAIR as an employee eligible for protection of the Act (Tr. 3, 266). USAIR is an interstate air carrier, subject to the Act (Tr. 2, 266). USAIR hired Hulsey on probationary status in September, 1982 (Tr. 3, 266). USAIR requires all new pilots to serve a one-year probationary period (Tr. 235, 266).

During Hulsey's training and his first three months of active service with USAIR, he was a defendant in a federal tax crimes suit in the United States District Court for the Northern District of Texas, Fort Worth Division (Tr. 3-4, 266). Hulsey's participation in the trial required him to periodically miss work. *Id.* On March 12, 1983, Hulsey was found guilty of conspiring to defraud the federal government and willfully subscribing false individual income tax returns; the conviction was affirmed by the Fifth Circuit Court of Appeals (Tr. 4, 266; *United States v. Daly*, 576 F.2d 1076, 1079 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 574 (1966)). USAIR suspended Hulsey in March, 1983 without notice or opportunity to be heard, and terminated him on May 1, 1983 (Tr. 4, 267) USAIR stated the reason for plaintiff's termination as his frequent unavailability for work and his criminal conviction (Tr. 5, 257).

Other facts, specifically those surrounding and including this question of whether USAIR's stated reasons were pretexts (an allegation in the case) are disputed. In his complaint, Hulsey pled detailed specific facts (Tr. 2-6, ¶ 5.1-5.24) and alleged USAIR had circumvented the Right of First Hire provisions of the Employee Protection Program of the Act "by terminating plaintiff's employment without justification and under the guise of [his] so-called 'probationary period'" (Tr. 6, ¶ 6.1). Hulsey alleged that USAIR's stated reasons for termination were pretextual, and that the termination was a bad faith circumvention of his right of first hire under the Act (Tr. 3-7, see especially ¶¶ 5.8-5.18, 5.20, 5.22, 6.1-6.3, 8.2). USAIR disputed these factual allegations (Tr. 11-19).

Hulsey submitted extensive written discovery to USAIR, consisting of Plaintiff's First Request for Production of Documents (Tr. 161-63) and Plaintiff's First Set of Interrogatories and Request for Admission (Tr. 164-78). Document requests particularly relevant to the

issues of circumvention of the Act and pretextual discharge still pending when the district court granted summary judgment decision were (Tr. 161-63):

> 1. The contents of all personnel files kept by Defendant USAIR, Inc., concerning plaintiff.
>
> * * * *
>
> 3. All documents concerning, supporting, or relating to plaintiff's discharge, including statements of all witnesses that are not privileged.
>
> * * * *
>
> 5. All rules and regulations (in effect) governing employees' duties and conduct maintained by defendant at any time during the period of employment of plaintiff.
>
> 6. Plaintiff's attendance and sick leave record.
>
> 7. All [defendant's] policies with respect to sick leave, absenteeism and/or tardiness.
>
> 8. All documents showing the prerequisites or qualifications to be hired as an Air-crew Member (Pilot) by Defendant that were in effect at any time while Plaintiff was in the employ of Defendant.
>
> * * * *
>
> 10. All documents indicating conviction(s) of aircrew members while in the employ of USAIR, Inc., of felony offenses or misdemeanors involving moral turpitude; and as to any aircrew Member(s) with a document(s) indicating such a condition, his or her complete personnel file(s).

Likewise, many of Plaintiff's First Set of Interrogatories and Request for Admission (Tr. 167-76) were highly relevant to the issues of circumvention and pretextual termination:

> I.5. Please state the date and time of discharge.
>
> I.6. Please identify the individual or individuals who made the decision, identify all those who had in-

put into the decision to discharge plaintiff, and state the degree of input by each.

* * * *

I.8. State in detail what opportunity Defendant gave Plaintiff to explain the conduct which gave rise to his discharge by Defendant.

* * * *

I.11. Please list the clause or clauses of any collective bargaining agreement upon which Defendant relied upon to justify the discharge of Plaintiff.

I.12. Please state the provisions of any written rules and regulations governing employees' duties and conduct upon which Defendant relied to justify the discharge of Plaintiff.

I.13. Please state in detail any unwritten policies of Defendant with respect to the type of conduct involved in the discharge of Plaintiff.

I.14. Please state in detail Defendant's policy, whether written or unwritten, with respect to written reprimands or warnings.

I.15. Please state in detail the company's written or unwritten policies, if any, with respect to the utilization or oral reprimands or warnings.

I.16. Please state whether any warnings, written or oral, were made to Plaintiff and if so, please state the date, identify the individual who gave the warning, and state in detail the circumstances under which warnings were made.

* * * *

I.18. Please state whether or not Defendant has attempted to hire employees in accordance with the Airline Employee Protection Program established by Section 43 of the Airline Deregulation Act of 1978 (Public Law 95-504).

I.19. Please state the names of all aircrew members (Pilots) hired by Defendant since October 24,

1987, being sure to identify all such hirees who were protected or are arguably protected under the Airline Deregulation Act of 1978, including the name of their prior airline employer.

I.20. Please state the names of each and every individual employee that Defendant has hired since October 24, 1978 that Defendant deemed excepted from the Act's Employee Protection Program, including the employee's position, status, and reason for the exception.

I.21. Please state in detail Defendant's hiring policies regarding "protected employees" under 49 U.S.C. § 1552 during the period of: a. May 12, 1982 to August, 1983 and b. August 1983 to the present.

I.22. Please state in detail any (and all) steps that have been taken by Defendant to comply with the Airline Deregulation Act of 1978 and specifically with respect to the Act's Employee Protection Program.

A.7. Please admit that Defendant has no written policy that termination of a pilot found guilty of a tax crime by petit jury is "job related."

A.8. Please admit that Defendant has no written policy that termination of a pilot who has been found guilty of a tax crime by a petit jury is a "business necessity" (Tr. 167-176).

USAIR never answered this discovery, though the allegations were not abandoned, and the discovery was only held in abeyance. The day before USAIR's responses were due, the district court entered an Agreed Order staying proceedings pending a final decision in another lawsuit challenging the constitutionality of the Act (R. 27). Following the Supreme Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 94 L.Ed.2d 661 (1987), the district court entered a scheduling order setting an August 3, 1987 deadline to file motions and briefs on the dispositive legal issues raised by Plaintiff's Original Complaint (Tr. 100).

Pursuant to that Scheduling Order, USAIR filed a Motion for Summary Judgment on July 31, 1987 (Tr. 102). Plaintiff responded (Tr. 179), and filed summary judgment evidence (Tr. 140-178). Hulsey's opposition stressed that there would be no basis for granting summary judgment, given the outstanding discovery as to the cause of plaintiff's termination, unless the court ruled that a carrier fully and completely satisfies all obligations under the Act by the simply hiring a "protected" employee (Tr. 190-92). Hulsey reminded the district court:

> Further, it is an established principle of arbitration law (utilized by arbitrators to resolve disputes as to whether just cause exists for termination) that employees generally are not subject to discharge or discipline for conduct away from company premises. Elkouri and Elkouri, *How Arbitration Works* (4th Ed. 1985), at 656-658.

Hulsey's Affidavit stated:

> 22. On information and belief, USAIR had a policy of not hiring "protected employees" from July, 1982 until August, 1983. I am attempting in this lawsuit, by means of Plaintiff's First Request for Production of Documents, hand-delivered September 14, 1984 to Defendant (Exhibit I) and Plaintiff's First Set of Interrogatories and Requests for Admission, hand-delivered on September 14, 1984 (Exhibit J attached hereto) to obtain documents and responses to interrogatories and requests for admission that will validate my information and belief. (Tr. 145).

The district court expressly made no determination as to disputed facts—whether the termination of Hulsey was a sham, or whether USAIR would have retained or had a policy of retaining nonforced hire probationary (or non-probationary) pilots despite felony convictions with sentences of imprisonment. Further (and obviously since discovery on this point was being held in abeyance), the district court did not hinge its decision upon the existence or non-existence of "evidence that Hulsey was treated

any differently from any other USAIR pilot who was convicted on a felony offense and sentenced to prison therefor" (quoting from the Fifth Circuit Decision, Slip Opinion, at 2690-2691). Rather, the district court stated: "Disputed facts unnecessary to the cause of action will not be considered" (Tr. 267). Then it narrowly defined the summary judgment question as follows:

> The question before the Court is whether hiring the Plaintiff on probationary status circumvents the right of first hire provided in the Act. *Defendant contends that its duty was satisfied once Plaintiff was hired.* Plaintiff contends that hiring him on probationary status nullifies the protection afforded by the Act, because he could be terminated without cause at any time during the one-year probationary period. (emphasis added).

(Tr. 268). The district court's decision can accurately be characterized as agreement with the position of Defendant—that a carrier satisfies its duty by hiring a "protected employee." The district court held (Tr. 270-71):

> Thus, the Court concludes the plain language of the Act and the regulations promulgated pursuant thereto imposed on Defendant a duty to hire Plaintiff as an employee protected under the Act. Once hired, Defendant owed no greater duty to Plaintiff than to other newly-hired pilots. Defendant hires all pilots for a one-year probationary period. Collective Bargaining Agreement, *supra*. During this probationary period, pilots can be terminated at Defendant's discretion. Thus, the court need not reach the issue of whether Plaintiff was terminated for just cause.

Not only did the district court not reach the issue of "just cause," it did not reach any issues, nor have undisputed facts concerning Plaintiff's allegations concerning circumvention of the Act, bad faith, and pretextual termination. There was no basis whatever for the district court to rule, nor did it, that USAIR terminated

Hulsey in good faith. According to the district court's analysis, the role of the federal courts in a case brought pursuant to the Deregulation Act ends at the moment the carrier proves that it satisfied its obligation under the Act—namely, that it hired the "protected employee."

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE IMPORTANT QUESTION OF WHETHER A COURT OF APPEALS MAY AFFIRM A SUMMARY JUDGMENT ON THE BASIS THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT WHERE PLAINTIFF WAS STAYED FROM SEEKING ANY DISCOVERY.

II. THIS COURT SHOULD CLARIFY THE IMPORTANT QUESTION OF WHETHER IT IS PROPER FOR A COURT OF APPEALS TO AFFIRM A SUMMARY ON THE BASIS THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT WHEN THE BASIS OF THE DISTRICT COURT'S SUMMARY JUDGMENT WAS ON AN ISSUE WHICH DID NOT INVOLVE RESOLVING DISPUTED ISSUES OF MATERIAL FACTS AND DURING WHICH TIME PLAINTIFF WAS STAYED FROM SEEKING ANY DISCOVERY.

III. THIS COURT SHOULD CLARIFY THE IMPORTANT QUESTION OF WHAT PROOF SCHEME IS APPLICABLE IN A CLAIM BROUGHT BY A PROTECTED EMPLOYEE UNDER THE AIRLINE DEREGULATION ACT OF 1978.

Rulings of the Supreme Court,[3] and the highly significant age discrimination decision of the Fifth Circuit in *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), are directly at odds with the approach of the Fifth Circuit in the instant matter. *Celotex* and *Bishop*, of course, stand for the propo-

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[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986); *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684 (1976).

sition that in connection with a motion for summary judgment, a district court is required to resolve all genuine disputes as to material facts in favor of the plaintiff, and the district court may not grant summary judgment in advance of full discovery.

Thornbrough, dealing with the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*, stands for the crucial proposition that summary judgment is generally inappropriate for resolving issues of motivation and intent that often can be only proved through circumstantial evidence. *Thornbrough*, *supra*, 760 F.2d at 640-41. More particularly, *Thornbrough* holds that a party who claims his discharge was the result of an improper motivation (age discrimination) is not doomed to fail simply because the employer articulates a non-discriminatory business reason for the firing. *Thornbrough*, *supra*, 760 F.2d at 638, eloquently refutes the proposition that only victims of wrongfully intended terminations whose bosses are latter-day George Washingtons and admit wrongful intent may obtain relief in the courts. Under *Thornbrough*, once the employer has articulated a non-discriminatory business reason for termination, the the party claiming wrongful intent in termination may, through circumstantial or direct evidence, attempt to show, by a preponderance of the evidence, that the stated reason is a pretext. If the stated reason is a pretext, the legal result is the same, it is as though the employer had never articulated a non-discriminatory business reason—the plaintiff prevails.

Thornbrough is itself a progeny of landmark Supreme Court cases, such as *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). As the Court ruled in *Aikens*, in a disparate treatment suit, the ultimate issue is whether the employer intentionally discriminated against the plaintiff. *Aikens*, *supra*, 460 U.S. at 715.

Although *Hulsey* involves the issue of alleged discrimination on the basis of status as a "protected employee" under the Airline Deregulation Act, the proof scheme for disparate treatment cases outlined by the Supreme Court under Title VII cases should have full application. The Fifth Circuit's ruling in *Hulsey* is a gross and dangerous departure from the Supreme Court's standards as to proof of disparate treatment cases—it would ensure the plaintiff loses unless he presents "smoking gun" evidence or an admission. Clearly, the Supreme Court should protect against such a doctrine.

Here, although the Fifth Circuit properly held that analysis of a claim by a protected employee under the Airline Deregulation Act of 1978 (the Act) cannot stop at simple proof that the carrier hired the protected employee, the Panel itself *resolved* the material disputed facts (the ones the district court expressly refused to resolve and USAIR labeled immaterial) adversely to Hulsey. (Slip Opinion, 2690, fn. 3.) The Fifth Circuit labeled crucial disputed facts as undisputed—whether USAIR would continue to employ pilots who were convicted for off-duty misconduct under some circumstances and whether USAIR treated Hulsey as it would its other pilots under similar circumstances (Slip Opinion, 2690)—when in fact, Hulsey alleged to the contrary, submitted an affidavit to the contrary, and had extensive discovery pending on these matters.

The decision of the Fifth Circuit in this important employment discrimination area is exactly opposite the rules established by the Supreme Court and Fifth Circuit for entry of summary judgment. *Bishop, supra; Celotex, supra; Thornbrough, supra.* Moreover, the Fifth Circuit's decision is akin to a ruling, as a matter of law, in an age discrimination case that an employer would have fired the employee regardless of his age, based upon the employer's mere denial that age was a factor in the discharge and articulation of a non-discriminatory business reason. Just as in *Thornbrough*, summary judgment

cannot issue on the basis of the employer's denial and articulation of a non-discriminatory business reason—a claimant under the Act is entitled to discovery and trial as to the "nebulous questions of motivation and intent." *Thornbrough, supra*, 760 F.2d at 640.

IV. THIS COURT SHOULD CLARIFY THE IMPORTANT QUESTION OF WHETHER THE SYSTEM BOARD OF ADJUSTMENT, WHICH WAS ESTABLISHED PURSUANT TO THE RAILWAY LABOR ACT, IS THE REQUIRED FORUM FOR HEARING THE MERITS OF A CLAIM THAT AN EMPLOYEE WAS TERMINATED BECAUSE OF HIS STATUS AS A FORCED-HIRE EMPLOYEE UNDER THE AIRLINE DEREGULATION ACT OF 1978.

Although the Fifth Circuit decision did not reach it, because it treated disputed facts as undisputed, and erroneously affirmed summary judgment, this appeal involves a question of exceptional importance. Specifically, in light of the Fifth Circuit's correct ruling that an employer does not insulate itself against any claim under the Act by merely hiring a "protected employee," a major question remains concerning what forum should resolve the merits of Hulsey's case. After his discharge, USAIR gave Hulsey no opportunity to explain his situation; nor, despite his efforts, would USAIR provide him any hearing or access to the grievance procedure despite the collective bargaining agreement (CBA) between USAIR and the Airline Pilots Association providing for a grievance procedure and a neutral determination of whether just cause existed for termination (Tr. 143-44, Hulsey Affidavit, ¶ 14). USAIR excused this on grounds that probationary employees lack grievance rights. *Id.*

The question of which forum should address the issue of USAIR's actual motivation for firing Hulsey—the federal district court or a System Board of Adjustment (arbitration)—is far more complex than it might appear at first blush. We submit that the Airline Deregulation

Act of 1978 must be read in conjunction with other federal laws and specifically the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, that sets forth labor law for railroad and airline employees. Although this case can simply be remanded for discovery and trial to a federal judge or jury under the *Thornbrough*, *supra*, format, logic and the scheme of federal labor law indicate a remand for entry of judgment in favor of Hulsey and an order to USAIR to proceed to a System Board of Adjustment for determination of whether Hulsey would not only have been fired, but would have stayed fired (i.e. whether just cause existed) had he been a non-forced hire, non-probationary pilot. This would not be a mere claim of unjust cause discharge, under which a probationer lacks grievance rights. It would be specific claim by a "protected employee" that his firing was for an improper motive.

Questions of termination are "minor" disputes under the Railway Labor Act. *Brown v. American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979). Federal labor law favors submitting employee termination disputes to arbitration. *Machinists v. Central Airlines*, 372 U.S. 686 (1963). The RLA requires that disputes between employees and carriers growing out of grievances (minor disputes) be resolved through the grievance procedure, including a System Board of Adjustment. RLA, 45 U.S.C. § 184.

The Fifth Circuit's holding in *Brown v. American Airlines, Inc.*, *supra*, illustrates that in dealing with airline employees, normal presumptions simply do not apply. The Fifth Circuit in *Brown* held that assuming that airline mechanic Brown made an agreement with American Airlines whereby he withdrew his grievance in connection with layoff in exchange for a promise that he would be returned to work after receiving a federal mechanic's license, the remedy for breach of that agreement would, in the first instance, be with the System Board of Adjustment under the Railway Labor Act, since the validity

of the agreement could only be assessed with reference to the CBA. *Brown*, *supra*, 593 F.2d at 655-56. The court pointed out:

> [A]ssuming the agreement is not invalidated by its inconsistency with the [BCA] this claim . . . stems from, and depends upon rights secured by the [CBA] Brown's original claim, which led to the settlement agreement, was based on a job-reclassification and loss of seniority, the stuff out of which minor disputes are classically made.

The district court, after incorrectly concluding that, in effect, a carrier can terminate a "protected employee" where it would not have terminated a non-forced hire, did not reach the question of whether USAIR terminated Hulsely for just cause (Tr. 270-71). The Fifth Circuit's decision noted the relevancy of an inquiry as to whether "USAIR discharged Hulsely as a forced hire when it would not have discharged a non-forced hire probationary pilot, or indeed a nonprobationary pilot, under the same circumstances . . . ." (Slip Opinion, at 2690). Certainly, as in *Brown*, *supra*, the question of just cause for termination is the "stuff out of which minor disputes are classically made." *Brown*, *supra*, 593 at 655. It is necessary to determine just cause (either by federal court or System Board of Adjustment decision) since a carrier has the power to act and the employee has only the right to react—through the grievance system and ultimately to a System Board of Adjustment. Thus, a carrier can fire an employee without cause, and often will do so to the result that the employee is ultimately reinstated by System Board of Adjustment decision as though no discharge had occurred.

It fosters the favored status of arbitration, for a "protected employee" under the Act who claims to have been terminated in violation of his rights under the Act, to submit the merits of his claim to the grievance procedure and to the System Board of Adjustment in the first in-

stance. If the System Board of Adjustment determines that the carrier lacked just cause (a decision that flows into the System Board's jurisdiction under the CBA to determine such issues), this determination may well influence and indeed decide the question of whether the reason stated by the carrier for termination of the "protected employee" was pretextual. Under the RLA, 45 U.S.C. § 153(p)(q), judicial review of decisions of the System Board of Adjustment is limited to actions "for failure . . . to comply with the requirements of this chapter, for failure of the order to conform, or confine itself to matters within the scope of [its] jurisdiction, or for fraud or corruption [in] making the order." 45 U.S.C. § 153 First (p).

While Hulsely is prepared to pursue this matter either through discovery and trial in the federal district court or through the grievance procedure, including a System Board of Adjustment hearing, it is most logical for the Airline Deregulation Act and the Railway Labor Act to be read in conjunction so that a "protected employee who claims to have been terminated in violation of his rights under the Act should be entitled to the grievance procedure for resolution of the merits of his claim. It is illogical to bypass the System Board of Adjustment and the judicially-favored arbitration process.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-1886

DANIEL P. HULSEY,
Plaintiff-Appellant,
v.

USAIR, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

April 3, 1989

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Daniel P. Hulsey (Hulsey), a commercial pilot, brought this civil action suit against his former employer, defendant-appellee USAir, Inc. (USAir), seeking declaratory relief and money damages for USAir's alleged violation of the Airline Deregulation Act of 1978, § 43(d), 49 U.S.C. App. § 1552 (1987). The district court, Judge Barefoot Sanders, rendered summary judgment in favor of USAir. We affirm.

Facts and Proceedings Below

The following facts were found by the district court and are not in dispute.

Hulsey was employed as a commercial airline pilot for Braniff Airways, Inc., from 1973 to 1982, when Braniff ceased operations and filed bankruptcy. In June 1982, after Braniff ceased operations, Hulsey, an employee eligible for protection under the Airline Deregulation Act of 1978 (the Act), applied for employment as a pilot with USAir, an interstate air carrier subject to the provisions of the Act. In September 1982, USAir hired Hulsey on probationary status. USAir requires all new pilots to serve a one-year probationary period, after which the pilots can be fired only for cause. Hulsey was on non-probationary status when he worked for Braniff.

During his training and first three months of active service with USAir, Hulsey was a defendant in a federal criminal prosecution for several income tax-related felonies, and his participation in that trial caused him to miss work periodically. On March 12, 1983, a jury found him guilty of one count of conspiring to defraud the federal government under 18 U.S.C. § 371, and three counts of willfully subscribing false individual income tax returns under 26 U.S.C. § 7206(1) (1976), and on April 22, 1983 he was sentenced to concurrent thirty months' imprisonment terms on each count and a $5,000 fine.[1] On March 15, 1983, USAir suspended Hulsey without notice or opportunity to be heard, and on May 1, 1983, following his sentencing, Hulsey was fired. USAir's stated reasons for Hulsey's termination were his frequent unavailability for work and his criminal convictions.

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[1] This Court eventually affirmed Hulsey's conviction and he served seven months of his sentence beginning in August 1985. *See United States v. Daly*, 756 F.2d 1076 (5th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 558 (1985).

Hulsey then filed the present action against USAir in November 1983. Hulsey alleged in his complaint that USAir had violated its duty under the Act's first right of hire provision, which requires that airlines give a hiring preference to employees dislocated as a result of the deregulation of the airline industry. He further alleged that he was denied employment opportunities because of this violation. The Act's first right of hire provision, which is codified at 49 U.S.C.App. § 1552(d)(1), states in pertinent part:

> "Each person who is a protected employee of an air carrier which is subject to [the Act] who is . . . terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees. . . . Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person. . . ."

According to Hulsey, USAir circumvented its duty under this provision by hiring him on probationary status, which permitted the carrier to terminate his employment without cause during the first year of employment notwithstanding the statutory hiring preference.

USAir responded by filing a motion to dismiss and a motion for summary judgment. USAir argued that by hiring Hulsey it had satisfied its duty under the first right of hire provision and that Hulsey's subsequent discharge did not constitute a violation of that provision. In an order dated October 20, 1987, the district court granted USAir's motion for summary judgment stating that USAir's duty to hire under the first right of hire provision does not imply protection beyond hiring. The district court noted that pursuant to its collective bargaining agreement with the Air Line Pilots Association, USAir hires all its pilots for a one-year probatonary

period, and during that period any pilot can be terminated at USAir's discretion. The court further noted that while the Act imposed a duty on USAir to hire Hulsey, once Hulsey was hired USAir owed no greater duty to him than it did to any of its other newly hired pilots. The court therefore concluded that once Hulsey was hired, USAir could terminate him without cause within the one-year probationary period, just as it could terminate any of its other newly hired pilots. Hulsey now appeals that decision.

Discussion

On appeal, Hulsey contends that the district court misinterpreted the Act when it concluded that the first right of hire requirement is satisfied once the "protected" employee is hired. According to Hulsey, this interpretation renders the first right of hire provision meaningless, for a carrier could theoretically satisfy its obligation under the provision by hiring a protected employee one moment and firing him the next, and then hiring the carrier's first choice without the restrictions of statutory hiring preferences. This kind of protection, Hulsey argues, is no protection at all. Thus, Hulsey contends that for the provision to have meaning, it must be interpreted to impose a duty of hiring protected employees on a permanent rather than probationary status. Furthermore, Hulsey contends that to give meaning to the first right of hire privilege, the "protected" employees must be allowed to challenge a wrongful termination in a grievance procedure (including labor arbitration) or in the federal courts. Hulsey contends that such an interpretation of the Act "would be consistent with a long series of rights deemed by the courts to flow from the duty to bargain in good faith provided under the Railway Labor Act, 45 U.S.C. § 152, . . . and the Labor Management Relations Act, 29 U.S.C. § 158(a)(5)."

We reject these arguments for the reasons set forth in the district court's opinion, which is reproduced as the

appendix hereto. After reviewing the legislative history of the first right of hire provision, the district court concluded that Congress intended to limit the employment protection to a hiring preference.[2] Beyond the hiring, the district court concluded, the law does not afford the protected employees preferential treatment.[3] We agree with these conclusions.

In short, we are in agreement with the district court's opinion and we affirm on that basis. We add, however, that we do not read the district court's opinion as saying that USAir discharged Hulsey as a forced hire when it would not have discharged a nonforced hire probationary pilot, or indeed a nonprobationary pilot, under the same circumstances; indeed, there is no evidence to this effect. In this case, it is undisputed that USAir will not employ pilots who are convicted felons, and it is undisputed that Hulsey was fired because of his multiple felony convictions after he was sentenced to thirty months' imprisonment. There is no allegation or summary judgment evidence that USAir has retained, or has a policy of retaining, probationary (or nonprobationary) pilots who are not protected by the Act despite felony convictions with sentences of imprisonment; thus, there is no evidence

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[2] And as the district court correctly noted, the protected employee must meet the qualification requirements established by the air carrier (other than those qualifications concerning initial hiring age or recall rights) as required by regulations promulgated by the Secretary of Labor under the authority of the Act. *See* 29 C.F.R. § 220.23.

[3] We do not suggest that a willful sham hiring—one undertaken only for the purpose of mere formal compliance with the Act's first right of hire provisions and with the intent to promptly terminate the new forced hire at the first opportunity—complies with the Act; but here there is no basis on which to conclude that the initial hiring was a willful sham; that it was probationary—as, pursuant to the collective bargaining agreement, was USAir's hiring of all its pilots—affords no basis whatever for any inference that it was a sham.

that Hulsey was treated any different from any other USAir pilot who is convicted of a felony offense and sentenced to prison therefor. The undisputed evidence indicates that Hulsey was afforded preferential treatment when he was hired, and that in subsequently discharging him USAir treated Hulsey as it would treat its other pilots under similar circumstances, as it is permitted to do under the law. Thus, since there was no genuine issue of material fact, the district court properly found that USAir is entitled to judgment as a matter of law.

Conclusion

For the reasons set forth in the district court's opinion, we find no merit in Hulsey's arguments. Accordingly, the judgment in favor of USAir is

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,

Plaintiff,

v.

USAIR, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

SANDERS, Acting Chief Judge.

Before the Court are Defendant's Motion to Dismiss and Motion for Summary Judgment, filed July 31, 1987; Plainitff's Response, filed August 31, 1987; and Defendant's Reply, filed September 18, 1987.

This is a civil action for declaratory relief and money damages attributable to Defendant's alleged violation of the Airline Deregulation Act of 1978, § 43(d), 49 U.S.C. App. § 1552 (1987) ("the Act"). Plaintiff's Original Complaint ("Complaint") at 1. Plaintiff alleges that Defendant violated its duty under the Act to first hire employees dislocated as a result of deregulating the airline industry. Specifically, Plaintiff alleges that Defendant circumvented its duty to offer plaintiff the "first right of hire" by hiring him on probationary status, since probationary employees may be terminated at any time without cause. Plaintiff contends that if probationary employment is considered to satisfy the Act, the protection afforded is illusory.

The material facts in this case are undisputed. Plaintiff was a pilot on non-probationary status with Braniff Airways, Inc. ("Braniff") from 1973 until Braniff ceased operations and filed for bankruptcy in 1982. Complaint at 2-3; Affidavit of Daniel P. Hulsey ¶ 3. On or about June 1, 1982, Plaintiff applied to Defendant as an employee eligible for the protection of the Act. Complaint at 3. Defendant is an interstate air carrier and is subject to the Act. Complaint at 2. Plaintiff was hired by Defendant on probationary status in September, 1982. Complaint at 3. Defendant requires all new pilots to serve a one-year probationary period. Collective Bargaining Agreement between USAir and the Air Line Pilots Association, Chap. 18. During the period of Plaintiff's training and his first three months of active service with Defendant, Plaintiff was a defendant in a trial in the United States District Court for the Northern District of Texas, Fort Worth Division, in which he was charged with tax crimes. Complaint ¶¶ 5.2, 5.8, 5.10, 5.12. Participation in the trial required Plaintiff to periodically miss work. Complaint ¶¶ 5.8, 5.10, 5.11. Plaintiff was found guilty on March 12, 1983 of conspiring to defraud the federal government and willfully subscribing false individual income tax returns. His conviction was affirmed by the Fifth Circuit Court of Appeals. Complaint ¶ 5.12 and *United States v. Daly*, 756 F.2d 1076, 1079 (5th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 588 (1985). On March 15, 1988 Defendant suspended Plaintiff without notice or opportunity to be heard and on May 1, 1983 Plaintiff was terminated. Complaint ¶ 5.13. The stated reason for Plaintiff's termination was his frequent unavailability for work and his criminal conviction. Complaint ¶ 5.15.

Existence of Genuine Issues of Material Fact

Summary judgment is proper when pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judg-

ment as a matter of law. *Fed.R.Civ.P.* 56. The substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputed facts unnecessary to the cause of action will not be considered. *Id.*

The elements of Plaintiff's cause of action for violating the Act are as follows: (1) Plaintiff is a protected employee under the Act; (2) Defendant is subject to the Act; and (3) Defendant violated its duty under the Act when it hired Plaintiff on probationary status rather than permanent status. The first two elements are not in dispute. *Compare* Complaint ¶¶ 5.5, 4.2 *with* Brief in Support of Defendant's Motion to Dismiss and Motion for Summary Judgment ¶ II.A.3., 4. The third element is a legal issue.

Defendant's Entitlement to Judgment as a Matter of Law

The question before the Court is whether hiring the Plaintiff on probationary status circumvents the right of first hire provided in the Act. Defendant contends that its duty was satisfied once Plaintiff was hired. Plaintiff contends that hiring him on probationary status nullifies the protection afforded by the Act, because he could be terminated without cause at any time during the one year probation period.

The Act provides that

> [e]ach person who is a protected employee of an air carrier which is subject [to this Act] who is . . . terminated by such an air carrier (other than for cause) . . . shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees . . . . Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person. . . .

The legislative history of the Act does not specifically address the scope of the duty to hire. As introduced, the

House version of the Act (HR 12611) required the protection afforded to airline workers to be no less favorable than that afforded to railway workers under the Interstate Commerce Act § 5(2)(f) and the Rail Passenger Service Act § 405. Interstate Commerce Act, 49 U.S.C. § 11347 and Rail Passenger Service Act, 45 U.S.C. §§ 565(a) and (b); *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 694, 107 S.Ct. 1476, 1485, 94 L.Ed.2d 661, 676 (1987). These statutes referred to in the House bill specify that railway workers are protected from a worsening of their employment position as a result of action taken pursuant to these statutes. However, the final version of the Act did not contain language referring to the broad protections afforded employees under the Interstate Commerce Act and the Rail Passenger Service Act.

The regulations promulgated by the Secretary of Labor pursuant to the grant of authority in the Act for administering the duty to hire refer to these provisions as the "Rehire Program." 29 C.F.R. § 220.02 (1986). The regulations specify that the covered air carrier has the duty to hire a protected employee before it hires any other applicant. *Id.* § 220.20(a). The protected employee must meet the qualification requirements established by the air carrier, other than those qualifications concerning initial hiring age or recall rights. *Id.* § 220.21(a).

The Act specifically refers to the air carrier's duty to *hire* protected employees before other applicants. Where possible, courts interpret the words of statutes "in their ordinary, every day sense." *Malat v. Riddell*, 383 U.S. 569, 571, 86 S.Ct. 1030, 1032, 16 L.Ed.2d 102 (1965); *Russello v. United States*, 464 U.S. 16, 21, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). To overcome this general rule, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U.S. 55, 60-61, 51 S.Ct. 49, 50-51, 75 L.Ed. 156 (1930). With this Act there is

no indication that Congress intended for the phrase "duty to *hire*" to imply protection beyond hiring. Indeed, the legislative history indicates that the House proposed arguably broader employee protections, but then omitted these broader protections from the final Act.[1] Congress' intent to limit the employment protection to a hiring preference can be inferred from their deleting the broader language in the final Act. *See Russello v. United States*, 464 U.S. 16, 23-24, 104 S.Ct. at 300-01 (1983).

Thus, the Court concluded the plain language of the Act and the regulations promulgated pursuant thereto imposed on Defendant a duty to hire Plaintiff as an employee protected under the Act. Once hired, Defendant owed no greater duty to Plaintiff than to other newly hired pilots. Defendant hires all pilots for a one year probationary period. Collective Bargaining Agreement, *supra*. During this probationary period, pilots can be terminated at Defendant's discretion. Thus, the Court need not reach the issue of whether Plaintiff was terminated for just cause.

Conclusion

Plaintiff was lawfully terminated. There is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED.

Date: October 20, 1987.

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[1] Some members of the House perceived that the final version of the Act as passed reduced the employment protection as provided in the earlier House version. Representative Anderson stated "[t]he House provisions on employee protection . . . were stronger than those in the [final Act]." *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1562 n. 10 (D.C. Cir. 1985), *citing* 124 Cong. Rec. 38,522 (1978). Representative Mineta stated that "[b]y comparison with the House-passed provision, the [final Act] is not much protection at all." *Id., citing* 124 Cong. Rec. 38,524-25 (1978).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1886

DANIEL P. HULSEY,
Plaintiff-Appellant,

versus

USAIR, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 3, 5 Cir., 1989, ——— F.2d ——)

(May 12, 1989)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

/s/ Walt Garwood
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,
Plaintiff

v.

USAIR, INC.,
Defendant

JUDGMENT

On October 20, 1987, the Court filed its Memorandum Opinion and Order pursuant to which Defendant is entitled to judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff Daniel P. Hulsey take nothing by his suit against Defendant, and that this suit be, and it is hereby, DISMISSED on the merits at Plaintiff's cost.

Signed this 20 day of October, 1987.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Acting Chief Judge
Northern District of Texas

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,
Plaintiff

v.

USAIR, INC.,
Defendant

MEMORANDUM OPINION AND ORDER

[Filed October 20, 1987]

Before the Court are Defendant's Motion to Dismiss and Motion for Summary Judgment, filed July 31, 1987; Plaintiff's Response, filed August 31, 1987; and Defendant's Reply, filed September 18, 1987.

This is a civil action for declaratory relief and money damages attributable to Defendant's alleged violation of the Airline Deregulation Act of 1978, § 43(d), 49 U.S.C. § 1552 (1987) ("the Act"). Plaintiff's Original Complaint ("Complaint") at 1. Plaintiff alleges that Defendant violated its duty under the Act to first hire employees dislocated as a result of deregulating the airline industry. Specifically, Plaintiff alleges that Defendant circumvented its duty to offer Plaintiff the "first right of hire" by hiring him on probationary status, since probationary employees may be terminated at any time without cause. Plaintiff contends that if probationary employment is considered to satisfy the Act, the protection afforded is illusory.

The material facts in this case are undisputed. Plaintiff was a pilot on non-probationary status with Braniff Airways, Inc. ("Braniff") from 1973 until Braniff ceased operations and filed for bankruptcy in 1982. Complaint at 2-3; Affidavit of Daniel P. Hulsey § 3. On or about June 1, 1982, Plaintiff applied to Defendant as an employee eligible for the protection of the Act. Complaint at 3. Defendant is an interstate air carrier and is subject to the Act. Complaint at 2. Plaintiff was hired by Defendant on probationary status in September, 1982. Complaint at 3. Defendant requires all new pilots to serve a one-year probationary period. Collective Bargaining Agreement between USAir and the Air Line Pilots Association, Chap. 18. During the period of Plaintiff's training and his first three months of active service with Defendant, Plaintiff was a defendant in a trial in the United States District Court for the Northern District of Texas, Fort Worth Division, in which he was charged with tax crimes. Complaint ¶¶ 5.2, 5.8, 5.10, 5.12. Participation in the trial required Plaintiff to periodically miss work. Complaint ¶¶ 5.8, 5.10, 5.11. Plaintiff was found guilty on March 12, 1983 of conspiring to defraud the federal government and willfully subscribing false individual income tax returns. His conviction was affirmed by the Fifth Circuit Court of Appeals. Complaint ¶ 5.12 and *United States v. Daly*, 756 F.2d 1076, 1079 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 574 (1986). On March 15, 1983 Defendant suspended Plaintiff without notice or opportunity to be heard and on May 1, 1983 Plaintiff was terminated. Complaint ¶ 5.13. The stated reason for Plaintiff's termination was his frequent unavailability for work and his criminal conviction. Complaint ¶ 5.15.

Existence of Genuine Issues of Material Fact

Summary judgment is proper when pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56. The sub-

stantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Disputed facts unnecessary to the cause of action will not be considered. *Id.*

The elements of Plaintiff's cause of action for violating the Act are as follows: (1) Plaintiff is a protected employee under the Act; (2) Defendant is subject to the Act; and (3) Defendant violated its duty under the Act when it hired Plaintiff on probationary status rather than permanent status. The first two elements are not in dispute. *Compare* Complaint ¶¶ 5.5, 4.2 *with* Brief in Support of Defendant's Motion to Dismiss and Motion for Summary Judgment ¶ II.A.3., 4. The third element is a legal issue.

Defendant's Entitlement to Judgment as a Matter of Law

The question before the Court is whether hiring the Plaintiff on probationary status circumvents the right of first hire provided in the Act. Defendant contends that its duty was satisfied once Plaintiff was hired. Plaintiff contends that hiring him on probationary status nullifies the protection afforded by the Act, because he could be terminated without cause at any time during the one year probationary period.

The Act provides that

> [e]ach person who is a protected employee of an air carrier which is subject [to this Act] who is . . . terminated by such an air carrier (other than for cause) . . . shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees. . . . Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person. . . .

The legislative history of the Act does not specifically address the scope of the duty to hire. As introduced,

the House version of the Act (HR 12611) required the protection afforded to airline workers to be no less favorable than that afforded to railway workers under the Interstate Commerce Act § 5(2)(f) and the Rail Passenger Service Act § 405. Interstate Commerce Act, 49 U.S.C. § 11347 and Rail Passenger Service Act, 45 U.S.C. §§ 565(a) and (b); *see Alaska Airlines, Inc. v. Brock*, 480 U.S. ——, 108 S.Ct. ——, 94 L.Ed.2d 661, 676 (1987). These statutes referred to in the House bill specify that railway workers are protected from a worsening of their employment position as a result of action taken pursuant to these statutes. However, the final version of the Act did not contain language referring to the broad protections afforded employees under the Interstate Commerce and the Rail Passenger Service Act.

The regulations promulgated by the Secretary of Labor pursuant to the grant of authority in the Act for administering the duty of hire refer to thees provisions as the "Rehire Program." 29 C.F.R. § 220.02 (1986). The regulations specify that the covered air carrier has the duty to hire a protected employee before it hires any other applicant. *Id.* § 220.20(a). The protected employee must meet the qualification requirements established by the air carrier, other than those qualifications concerning initial hiring age or recall rights. *Id.* § 220.21(a).

The Act specifically refers to the air carrier's duty to hire protected employees before other applicants. Where possible, courts interpret the words of statutes "in their ordinary, everyday sense." *Malat v. Riddell*, 383 U.S. 569, 571 (1965); *Russello v. United States*, 464 U.S. 16, 21 (1983). To overcome this general rule, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U.S. 55, 60-61 (1930). With this Act there is no indication that Congress intended for the phrase "duty to *hire*" to imply protection beyond hiring. Indeed, the legislative history indicates that the House proposed arguably broader employee protections, but then omitted these

broader protections from the final Act.[1] Congress' intent to limit the employment protection to a hiring preference can be inferred from their deleting the broader language in the final Act. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Thus, the Court concludes the plain language of the Act and the regulations promulgated pursuant thereto imposed on Defendant a duty to hire Plaintiff as an employee protected under the Act. Once hired, Defendant owed no greater duty to Plaintiff than to other newly hired pilots. Defendant hires all pilots for a one year probationary period. Collective Bargaining Agreement, *supra*. During this probationary period, pilots can be terminated at Defendant's discretion. Thus, the Court need not reach the issue of whether Plaintiff was terminated for just cause.

Conclusion

Plaintiff was lawfully terminated. There is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED.

DATED: October 20, 1987.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Acting Chief Judge
Northern District of Texas

---

[1] Some members of the House perceived that the final version of the Act as passed reduced the employment protection as provided in the earlier House version. Representative Anderson stated "[t]he House provisions on employee protection . . . were stronger than those in the [final Act]." *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1562 n.10 (D.C. Cir. 1985), *citing* 124 Cong. Rec. 38,522 (1978). Representative Mineta stated that "[b]y comparison with the House-passed provision, the [final Act] is not much protection at all." *Id., citing* 124 Cong. Rec. 38,524-25 (1978).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,

Plaintiff

v.

USAIR, INC.,

Defendant

ORDER

Pursuant to the request set forth in the Status Report, filed April 23, 1986, the Stay Order previously entered will continue in effect until further orders of the Court.

Counsel are directed to file a status report October 14, 1986.

SO ORDERED.

DATED: April 25, 1986.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,

Plaintiff

v.

USAIR, INC.,

Defendant

ORDER

Before the Court is a Status Report, filed December 9, 1985.

Counsel are directed to file another status report April 7, 1986, setting forth the status of the related District of Columbia litigation, with recommendations for the disposition of this case. The Stay Order previously entered will remain in effect.

SO ORDERED.

DATED: December 27, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-2017-H

DANIEL P. HULSEY,
Plaintiff

v.

USAIR, INC.,
Defendant

ORDER

Before the Court is a Second Status Report, filed August 16, 1985.

As requested by the parties, the Stay Order previously issued will continue in effect.

Counsel are directed to file a report December 9, 1985, concerning the status of the related litigation in the District of Columbia.

SO ORDERED.

DATED: August 19, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action Number CA3-83-1017-H

DANIEL P. HULSEY,
Plaintiff

v.

USAIR, INC.,
Defendant

AGREED ORDER

Came on to be considered the Motion to Stay urged jointly by Plaintiff and Defendant in this cause pending a decision by the District of Columbia Court of Appeals in the case styled *Alaska Airlines, Inc., et al v. Donovan, et al*, presently pending before that court, where in the constitutionality of Section 43 of the Airline Deregulation Act, Public Law No. 95-504, 92 Stat. 1705 (1978), is in issue. Since Plaintiff's cause of action is founded upon said statutory provision found unconstitutional by the district court in the above-styled cause, it is the opinion of the Court that the Motion for Stay is well founded; and

IT IS THEREFORE ORDERED that all proceedings in this cause shall be stayed pending a decision by the United States Court of Appeals for the District of Columbia in *Alaska Airlines, Inc., et al v. Donovan, et al*, and this cause is hereby removed from the Court's trial docket for November 19, 1984.

SIGNED AND ENTERED this 15 of October, 1984.

/s/ Barefoot Sanders
United States District Judge

AGREED:

/s/ William C. Strock
WILLIAM C. STROCK
Haynes and Boone
4300 InterFirst Two
Dallas, Texas 75270
214/744-0550
Attorneys for Defendant,
USAir, Inc.

/s/ Hal K. Gillespie
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Attorneys for Plaintiff,
Daniel P. Hulsey

APPENDIX I

§ 1552. Employee protection program

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who an account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not

accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been[1] entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e) of this section.

(e) Assistance for relocation

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate is-

sued under section 1871 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this title. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who

has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occuring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both House stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

(h) Definitions

For the purposes of this section—

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this title, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of

full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

(2)

No. 89-241

In The
Supreme Court of the United States
October Term, 1989

DANIEL P. HULSEY,

Petitioner,

v.

USAIR, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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September 7, 1989

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LIST OF PARTIES AND OTHER INTERESTED PERSONS

Parties to the proceeding are as follows:

1. Daniel P. Hulsey.
2. USAir, Inc. and USAir Group.
3. Hal K. Gillespie, Esq., Hicks, Gillespie, James, Rozen & Preston, P.C., One Mockingbird Plaza, Suite 760, Lock Box 127, 1420 West Mockingbird Lane, Post Office Box 560388, Dallas, Texas 75356-0388.
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6. Harry A. Rissetto, Esq., Morgan, Lewis and Bockius, 1800 M Street, Suite 800, Washington, D.C. 20036.

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In The

Supreme Court of the United States

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RESPONDENT'S BRIEF IN OPPOSITION

USAir, Inc., Respondent, submits this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner, Daniel P. Hulsey. The Petition should be denied because no issues of significant public importance are raised by the Petition, the Petition urges issues that were not raised before the circuit court or district court, and because legal issues described in the Petition do not have any factual basis in this case. The opinion of the Fifth Circuit, attached as Appendix A to the Petition, correctly describes the extent of protection afforded to displaced airline industry employees under section 43(d)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552(d)(1).

STATEMENT OF THE CASE

Respondent adopts the statement of facts and description of proceedings contained in the decision of the Fifth Circuit in this case. *See* Appendix A to the Petition, pp. 2a-4a.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Raise An Important Or Relevant Issue Concerning Application Of Rule 56 Of The Federal Rules Of Civil Procedure.

Points I and II in Petitioner's "Reasons For Granting the Writ" urge that the district court erred by awarding and sustaining summary judgment despite a stay of discovery. Plaintiff's arguments are not based on the facts of this proceeding. First, discovery was stayed by agreement of the parties — not over the opposition of Petitioner. This fact is confirmed by Appendix H to the Petition. Second, after the stay of proceedings was lifted, Petitioner did not request that his interrogatories be answered, he did not file a motion to compel, and he did not initiate any discovery. Third, in opposing Respondent's Motion for Summary Judgment, Petitioner did not urge that the stay of discovery rendered the Motion for Summary Judgment premature. Fourth, Plaintiff did not raise an issue concerning the procedural posture of Respondent's Motion for Summary Judgment in his appeal to the Fifth Circuit.[1] Finally, the interrogatories and requests for production served by Petitioner before the agreed stay of proceedings are not material to the specific, undisputed facts upon which summary judgment was granted.

II. No Issue Of Importance Concerning Burdens Of Proof Is Raised By The Petition.

In pages 10-13 of the Petition, Mr. Hulsey contends that certiorari should be granted to decide whether the *McDon-*

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[1] Failure to raise an issue before the district court or court of appeals weighs against granting a writ of certiorari. *See Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 244-245 (1985), *reh. denied*, 471 U.S. 1062 (1985); *Hoover v. Ronwin*, 466 U.S. 558, 574, n. 5 (1984), *reh. denied*, 467 U.S. 1268 (1984).

nell-Douglas[2] order of proof in employment discrimination cases is applicable to discharge claims under section 43(d)(1) of the Airline Deregulation Act of 1978. That issue of law is not supported by the facts and circumstances of this case, however, and is not appropriate for consideration by the Court. The district court and the court of appeals held that section 43(d)(1) extends only a preference in hiring and not post-hire rights superior to other employees. *See* Appendix A, p. 5a and Appendix D, p. 19a. Whether or not a sham hiring designed solely to circumvent the preference under section 43(d)(1) is actionable was not decided by the Fifth Circuit and is not an issue raised below or by the facts of this case. Petitioner alleged in proceedings before the district court that he was wrongfully discharged, he did not allege that he was hired with the intent of terminating his employment just to get around section 43(d)(1). Thus, the Court need not decide the legal sufficiency or define the order of proof that would apply in a case where facts alleged state a sham hiring cause of action.

III. Petitioner's Argument That USAir, Inc.'s Right To Terminate His Employment Should Have Been Deferred To Arbitration is Without Merit.

Petitioner's contention that his termination should have been referred to a System Board of Adjustment is specious. Petitioner did not allege, argue, or offer evidence before the district court that he attempted to file a grievance over his discharge or made any effort to invoke a System Board. The decision to challenge his discharge in federal court was made by Mr. Hulsey, and the limitations period for an action to compel arbitration over his termination from employment expired long before summary judgment was awarded. Additionally, the collective bargaining agreement gives the em-

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[2] *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973).

ployer the right to terminate pilots during their first year of employment at USAir without regard to just cause and the employer and union have agreed that grievances over such discharges will not be heard by a System Board. Petitioner may not be heard to complain that he should have been given an arbitration hearing.

Putting aside the procedural deficiencies of Petitioner's arbitration deferral argument, there is no plausible ground for the argument that the Airline Deregulation Act provides for resolution of first right of hire claims through a System Board of Adjustment. Disputes arising under a labor contract between a carrier and a labor organization must be decided by a System Board, but no such dispute is at issue here. Petitioner's cause of action involves interpretation and application of the Airline Deregulation Act of 1978 and there is no basis for suggesting that the statute must be interpreted in the first instance by an arbitrator. *See McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265 (1968) (System Board not preemptive of claim by employee to enforce rights under federal veterans' preference laws); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1984) (dispute over application of Railway Labor Act, as opposed to labor contract, not limited to System Board of Adjustment).

IV. No Issue Of Substantial Public Importance Is Raised By The Petition.

Only employees of a certificated air carrier furloughed or terminated before October 24, 1988, as a consequence of economic problems attributable to airline deregulation, were extended a hiring preference. Employees laid off or terminated in reductions-in-force after October 24, 1988 are not covered by section 43(d)(1), and the volume of reported case law under section 43(d)(1) during the decade following

deregulation is slight. Congress' purpose in enacting section 43(d)(1) is appropriate, but little gain can be had to the public at-large by interpreting the scope and application of section 43(d)(1) at this time. Accordingly, the Petition should be denied. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1959) (importance of an issue must be viewed from perspective of society at-large — not just the interests of the parties).

Conclusion

None of the reasons advanced by Petitioner justifies granting a writ of certiorari. The district court and Fifth Circuit correctly held that section 43(d)(1) does not extend post-hiring protection greater than the protection against termination shared by other newly hired employees of a carrier. Petitioner did not raise an issue concerning actionability of allegedly sham hirings below, and there is no legitimate controversy or legal issue of substantial importance about the lower courts' application of FRCP 56 or its failure to defer to a System Board of Adjustment.

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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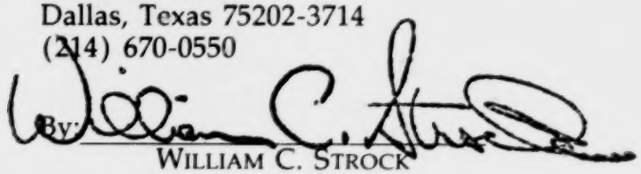

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

Key inaccuracies, more than hollow arguments, necessitate reply to USAir's Brief in Opposition. For convenience, this reply is organized per roman numeraled headings utilized by USAir.

I. IMPROPER SUMMARY JUDGMENT ISSUE

The five points urged by USAir are either grossly inaccurate or of no value to USAir's assertion that the writ should be denied. First, the fact that discovery was stayed by agreement in no way mitigates the harm of the court's summary judgment in advance of discovery. Indeed, this fact exacerbates the harm of the approach outlawed by this Court in *Celotex Corporation v. Catrett*,

477 U.S. 317, 91 L.Ed.2d 165 (1986). Cooperation in discovery is to be encouraged. Where, as here, a question about the underlying validity of the statute was pending Supreme Court determination, an agreed stay of discovery was in order. Likewise, where, as here, defendant wished to submit an issue for summary judgment determination that might have obviated the need for discovery, an agreed stay of discovery is in order. On the other hand, where, as here, the Supreme Court upholds the underlying statute[1] and then the Fifth Circuit reverses the basis of the district court's summary judgment (a summary judgment based on the premise that no discovery would be necessary since the employer was free to fire a "protected employee" for any reason, including an improper reason), the employer should, in good faith, *join* in the motion for rehearing filed by Hulsey so that remand rather than affirmance is the judgment of the Fifth Circuit.

Secondly, the fact that petitioner did not move to compel, nor initiate new discovery is unremarkable and irrelevant to USAir's opposition to the writ. Again, the parties were cooperating as to discovery so that the issue USAir felt would be dispositive could be placed before the district court without conducting potentially unnecessary and substantial discovery that was then pending. There was no need of new discovery; instead, there was a need for a ruling on a potentially dispositive issue. Not until the Fifth Circuit reversed the rationale of the district court was there any need for a continuation of the lawsuit, restarting at the discovery point; unfortunately, the Fifth Circuit abbreviated the process by reversing the rationale of the district court yet, in violation of *Celotex*, *supra*, granting summary judgment against plaintiff for lack of evidence.

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[1] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 94 L.Ed.2d 661 (1987).

Thirdly, USAir inaccurately advises this Court that Hulsey did not urge that the stay of discovery rendered the motion for summary judgment premature. On the contrary, Hulsey's opposition stressed that there would be no basis for granting summary judgment, given the outstanding discovery as to the cause of plaintiff's termination, unless the court ruled that a carrier fully and completely satisfies all obligations under the Act by simply hiring a "protected" employee (TR 190-192). Thus, the motion granted on the district's rationale *required* no discovery. But the Fifth Circuit rejected that rationale and thus, as Hulsey had advised the district court, discovery of disputed facts was essential.

Finally, it is absurd for USAir to suggest that "the interrogatories and requests for production served by Petitioner before the agreed stay of proceedings are not material to the specific, undisputed facts upon which summary judgment was granted" (Brief in Opposition, p. 2). While the district court viewed such interrogatories and requests for production irrelevant, since it ruled, as a matter of law, that a carrier fully and completely satisfies all obligations under the Act by simply hiring a "protected" employee, and then can immediately fire such an employee for any reason whatever, the issue before the Supreme Court is whether the Fifth Circuit, after reversing such a summary judgment holding, can then, nonetheless, grant summary judgment in absence of discovery that had been held in abeyance pending the resolution of the legal point the district court incorrectly resolved.

II. PROOF SCHEME ISSUE

As to whether the *McDonald Douglas*[2] order of proof in employment discrimination cases is applicable to discharge claims under Section 43(d)(1) of the Airline Deregulation Act of 1978 ("the Act"), USAir (1) misstates

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[2] *McDonald Douglas v. Green*, 411 U.S. 792 (1973).

the holding of the Fifth Circuit and (2) misstates plaintiff's allegations in the district court.

Specifically, USAir is badly inaccurate in suggesting that the district court and the Fifth Circuit had the same holding. While the district court held that Section 43(d)(1) extends only to a preference in hiring and not post-hire rights superior to other employees (Tr. 268, 270-71), the Fifth Circuit held that analysis of a claim by a protected employee under the Act *cannot* stop at simple proof that the carrier hired the protected employee. The entire *Celotex*, *supra*, problem stems from the next step taken by the Fifth Circuit: The Fifth Circuit *itself resolved* the material disputed facts (the ones the district court expressly refused to resolve and USAir had labeled immaterial) adversely to Hulsey. (Slip Opinion, 2690, fn. 3). The Fifth Circuit labeled crucial disputed facts as undisputed—whether USAir would continue to employ pilots who were convicted for off-duty misconduct under some circumstances and whether USAir treated Hulsey as it would other pilots under similar circumstances (Slip Opinion, 2690)—when, in fact, Hulsey alleged to the contrary, submitted an affidavit to the contrary, and had extensive discovery pending on these matters.

USAir again misstates the record badly to suggest Hulsey did not allege he was hired with the intent of terminating his employment just to get around Section 43(d)(1). In fact, Hulsey alleged USAir had circumvented the Right of First Hire provisions of the Employee Protection Program of the Act "by terminating plaintiff's employment without justification and under the guise of [his] so-called 'probationary period'" (Tr. 6, ¶ 6.1). Hulsey alleged that USAir's stated reasons for termination were pretextual, and that the termination was a bad faith circumvention of his right of first hire under the Act (Tr. 3-7, see especially ¶¶ 5.8-5.18, 5.20, 5.22, 6.1-6.3, 8.2).

III. SYSTEM BOARD OF ADJUSTMENT ISSUE

Again, USAir inaccurately suggests that there are "procedural deficiencies (Brief in Opposition, pp. 3-4) in connection with Hulsey's contention that his termination should have been referred to a System Board of Adjustment. In fact, Hulsey alleged that following his discharge, he requested a hearing without success and that he has exhausted his administrative remedies (Tr. 5, ¶ 5.17; 6, ¶ 5.24). The Hulsey affidavit, submitted in advance of summary judgment, stated, inter alia:

> 14. After my conviction, USAir gave me no opportunity to explain my situation, nor, despite my efforts, would USAir provide me any hearing or access to any grievance procedure. USAir did have a collective bargaining agreement with the Airline Pilots Association providing for a grievance procedure and a neutral determination of whether just cause existed for termination, but that procedure was denied to me entirely on grounds that I was a probationary employee.

(Tr. 143-44). In his Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment, Hulsey stated:

> [USAir] has devoted a major portion of its brief to an assertion that [Hulsey] was discharged for legitimate reasons . . . . That discussion, however, has no place at this point in the proceedings. Specifically, this discussion only has relevancy if the court determines that an employee hired under the right of first hire has protection against illegitimate (lack of cause) termination. In this event, the issue of just cause awaits determination on patently disputed facts (*with outstanding discovery*), either before the court, if the court concludes that wrongful termination matters should be submitted to the courthouse, even where a grievance procedure providing for labor arbitration is in place with the carrier, *or as we suggest, to a labor arbitrator.*

(Tr. 190) (emphasis added).

USAir's suggestion that Hulsey is somehow asking an arbitrator to interpret the Airline Deregulation Act of 1978 entirely misses the point. Certainly the court is the place for the necessary interpretation of the Airline Deregulation Act of 1978. Thus, Hulsey sought court interpretation by filing his federal court suit. The district court applied the improper interpretation; the Fifth Circuit in effect reversed the district court, but sidestepped the next question—whether Hulsey's termination was a violation of the Act—by granting summary judgment regardless of the facts (and pending discovery). Once the Fifth Circuit determined that a carrier may not immediately fire, for any reason including a purpose of circumventing the Act, a "protected" employee, someone, either a court or the grievance procedure of the carrier, must determine the merits—whether there was cause for termination or whether termination was for the purpose of circumventing the Act. Strong legal and policy arguments favor resolution of these issues before a System Board of Adjustment (the equivalent of a labor arbitrator) rather than in the courts.

IV. SUBSTANTIAL PUBLIC IMPORTANCE

It cannot be objectively argued that the key employee protection provision of a major federal commerce statute lacks importance to society-at-large. Whether in this, or in other congressional acts to protect employees, it is essential that the federal courts enforcing those acts apply proof schemes of the *McDonald-Douglas*, *supra*, pattern to avoid meaningless statutory "protections." Moreover, society-at-large, all potential litigants, has an interest in preventing the issuance of summary judgments despite outstanding, pertinent discovery.

Respectfully submitted,

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